



Rooney, J. M. (2016). Extraterritorial Derogation from the European Convention on Human Rights in the UK. *European Human Rights Law Review*, 2016(6), 656-663.

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# Extraterritorial Derogation from the European Convention on Human Rights in the UK

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## 1. Introduction

On 4 October 2016, UK Defence Secretary Michael Fallon announced that the UK would derogate from the European Convention on Human Rights (ECHR) in extraterritorial armed conflict.<sup>1</sup> The derogation is alleged to protect troops from ‘vexatious claims’, create ‘certainty’ in relation to the UK’s legal obligations abroad, and enable the Ministry of Defence to spend more money on equipment rather than legal fees. According to Fallon, military personnel will still be bound by domestic criminal law and the Geneva Conventions on the battlefield.<sup>2</sup> These reforms are consistent with Conservative Party proposals for a new British Bill of Rights intended to ‘limit the reach of human rights cases to the UK, so that British Armed forces overseas are not subject to persistent human rights claims that undermine their ability to do their job and keep us safe’.<sup>3</sup> This article first examines the claim that there is a need for a derogation by evaluating the UK’s obligations under the ECHR in extraterritorial armed conflict.<sup>4</sup> It asks whether ECHR norms impose an untenable burden on UK forces, and whether criminal law or international humanitarian law can provide a more

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<sup>1</sup> Ministry of Defence and The Rt Hon Michael Fallon MP, ‘Government to protect Armed Forces from persistent legal claims in future overseas operations’ (Gov.UK, 4<sup>th</sup> October 2016) available at <<https://www.gov.uk/government/news/government-to-protect-armed-forces-from-persistent-legal-claims-in-future-overseas-operations>> last accessed 25<sup>th</sup> October 2016.

<sup>2</sup> Ibid.

<sup>3</sup> ‘Protecting Human Rights in the UK: The Conservatives’ Proposals for Changing Britain’s Human Rights Laws’ (The Conservative Party, 2014) 7 available at <[file:///C:/Users/jr15181/Chrome%20Local%20Downloads/HUMAN\\_RIGHTS.pdf](file:///C:/Users/jr15181/Chrome%20Local%20Downloads/HUMAN_RIGHTS.pdf)> last accessed 25<sup>th</sup> October 2016.

<sup>4</sup> *Hassan v UK* (App No 29750/09), judgment of 16 September 2014); *Jaloud v Netherlands* (2015) 60 E.H.R.R. 29; *Serdar Mohammed v Secretary of State for Defence* [2015] EWCA Civ 843.

realistic benchmark for accountability in armed conflict. There is also consideration of the relationship between servicemen and women, and the ECHR.<sup>5</sup> The article then considers whether derogations are legally possible and whether it will ensure lower standards of accountability, and decrease judicial scrutiny of British military activity abroad. Finally, the article concludes with an analysis of the symbolic value of a derogation and its political ramifications.

## **UK obligations under the ECHR in extraterritorial armed conflict**

The right to life (art.2) and right to liberty and security (art.5) are the two main articles from which the government wishes to derogate.<sup>6</sup> As Marko Milanovic has correctly asserted, it would be unfeasible for the UK to derogate from the art.3 protection against torture or art.6's right of access to a court as part of a right to a fair trial.<sup>7</sup> The Court's treatment of the application of arts 5 and 2 to international armed conflict, and therefore its application to the UK in a foreign armed conflict, is set out below.

### **Article 5**

*Hassan v UK* indicates that the Court interprets art.5 in armed conflict in light of the standards of the Geneva Conventions, and where the latter does not provide specific guidance on the issue, human rights law is used to fill in the gap. In dealing with the substantive aspect of art.5, the Court took into account the Third and Fourth Geneva Conventions to conclude that art.5 could be interpreted as including internment without the requirement of a derogation because internment of Prisoners of War and detention of civilians who pose a threat to security were accepted features of international humanitarian law.<sup>8</sup>

In terms of the procedural aspect of art.5, both art.5(2) and art.5(4) of the ECHR have to be interpreted in a manner which takes into account the context and applicable rules of the

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<sup>5</sup> *Smith and Grady v UK* (1999) 29 E.H.R.R. 493; *Smith v The Ministry of Defence* [2013] UKSC 41.

<sup>6</sup> 'UK troops to be protected from "spurious legal claims"' (BBC, 4<sup>th</sup> October 2016) available at <<http://www.bbc.co.uk/news/uk-politics-37544280>> last accessed 25<sup>th</sup> October 2016.

<sup>7</sup> Marko Milanovic, 'UK to Derogate from the ECHR in Armed Conflict' (EJIL:talk! 5<sup>th</sup> October 2016) available at <<http://www.ejiltalk.org/uk-to-derogate-from-the-echr-in-armed-conflict/#more-14616>> last accessed 25<sup>th</sup> October 2016).

<sup>8</sup> *Hassan* (n 4) para 102.

Geneva Conventions.<sup>9</sup> Article 5(2) and 5(4) of the ECHR provide that the state must inform the detainee promptly of the reasons for his arrest, and take proceedings to determine the lawfulness of the detention speedily by a court respectively. The Court noted that arts 43 and 78 of the Fourth Geneva Convention stated that internment ‘shall be subject to periodical review, if possible every six months, by a competent body’.<sup>10</sup> Whilst it may not have been ‘practicable’ for the legality of detention to be determined by an independent ‘Court’ under art.5(4), the ‘competent body’ requirement under the Geneva Conventions was found to suffice for providing ‘impartiality and fair procedure to protect against arbitrariness’.<sup>11</sup> A screening process in the form of two interviews by US and UK military intelligence officers was enough to meet the criteria of ‘competent body’. The Court also found that under art.5(2) the reasons would have become apparent to the individual as to why he was being detained, and therefore there was no violation.<sup>12</sup> *Hassan* indicates that the ECHR does not impose untenable standards on troops and supports the proposition that the Geneva Convention should be enforced in armed conflict.

## Article 2

In *Jaloud v Netherlands*, the Court was prepared to make reasonable allowances for the relatively difficult conditions under which states must carry out investigations into alleged illegal killings under art.2 right to life, namely that the Member State is in a foreign country which needs to be rebuilt in the aftermath of hostilities, with a different language and culture, and where the population can be hostile to the international military presence.<sup>13</sup> In that decision, the Netherlands nevertheless failed to carry out an effective investigation because:

- a) important information had been withheld from judicial authorities and the applicant (a list of people present at the scene of the alleged killing, records of who fired shots at the time of the alleged killings);
- b) no precautions had been taken to prevent the accused Lieutenant from ‘colluding’ with other witnesses before he was questioned;
- c) the autopsy was not carried out to the standard required; and

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<sup>9</sup> Ibid para 106.

<sup>10</sup> Ibid para 106.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> *Jaloud* (n 4) para 226.

- d) important material evidence, including the bullet fragments taken from the victim's body, were mislaid.<sup>14</sup>

The accumulation of misdemeanours in the investigation meant that there was a violation of the procedural requirement to carry out an effective investigation. It is difficult to perceive this decision as imposing untenable standards on armed forces.

## **An Untenable Burden?**

The Court therefore appears to take into account the Geneva Conventions when enforcing the ECHR in extraterritorial armed conflict. Francoise Hampson acknowledges the important role that international human rights courts can have in ensuring that states act in conformity with the Geneva Convention in the absence, or due to the failing of, existing mechanisms for enforcing international humanitarian law.<sup>15</sup> The rhetoric that the ECHR enforces untenable standards on armed forces is therefore misleading, as the Court aims to hold states to account for failing to meet other international law obligations that are more specific to the context of armed conflict, and interprets human rights standards accordingly. Rather than act as a burden, human rights jurisprudence is instead considered when the Geneva Conventions *fail* to provide specific regulation on a matter.

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Similarly, human rights law can be used by states within a mosaic of legal obligations. The UK Court of Appeal held the UK government accountable for failing to meet legal standards other than those set out in the ECHR through adjudication of the Human Rights Act 1998 (HRA), which is domestic implementation legislation for the ECHR, in *Serdar Mohammed v Ministry of Defence*.<sup>16</sup> The Court of Appeal found that the UK government was in violation of art.5 for the detention of a suspected Taliban Commander in Afghanistan for almost four

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<sup>14</sup> Ibid para 227.

<sup>15</sup> Francoise Hampson, 'Using International Human Rights Machinery to Enforce the International Law of Armed Conflicts' (1992) 31 Military Law & Law of War Review 11.

<sup>16</sup> *Serdar Mohammed* (n 4). The *Serdar* case is currently pending before the Supreme Court. See further, Jane Rooney, 'A Legal Basis for Non-Arbitrary Detention: *Serdar Mohammed v Secretary of State for Defence*' Public Law (forthcoming 2016).

months. The Court exposed the fact that the UK government's detention policy had no legal basis in the International Security Assistance Force Standard Operating Procedure 362, the policy governing the activity of the NATO force in Afghanistan under which the UK.<sup>17</sup> Furthermore there was no legal basis in UK domestic law, Afghan domestic law or in international humanitarian law.<sup>18</sup> It also exposed the fact that Mohammed's detention and lack of procedural safeguards would have constituted a breach of international humanitarian law if it were applicable.<sup>19</sup>

## **The ECHR and its application to the military**

Three points must be made on the relationship between servicemen and women, and the ECHR and the HRA.

First, the ECHR imposes obligations on the UK government, and not individual soldiers for violations of human rights.<sup>20</sup> The UK government must provide an 'effective remedy' under art.13 of the ECHR, which may take the form of compensation, an effective investigation, and/or legal proceedings prescribed by UK domestic law for holding individuals accountable for illegal activity in armed conflict.

But even if the ECHR cannot be imposed against individual servicepersons, other regimes, seemingly ignored by Fallon, can. In terms of being concerned about individual accountability, Fallon failed to mention that in 2014 the Prosecutor of the International Criminal Court re-opened investigations into alleged war crimes committed in Iraq by UK forces which would necessarily implicate individuals rather than merely the state. Nor was he concerned that international criminal law standards would affect the performance of armed forces abroad.<sup>21</sup>

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<sup>17</sup> Ibid paras 125-253.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid paras 250, 298.

<sup>20</sup> Kanstantsin Dzehtsiarou, 'Different Human Rights at Home and Abroad: Immunity for British Soldier during Overseas Operations' (Just Security, 5 October 2016) available at <<https://www.justsecurity.org/33377/human-rights-home-abroad-immunity-british-soldier-overseas-operations/>> last accessed 25<sup>th</sup> October 2016.

<sup>21</sup> ICC, 'Prosecutor of the International Criminal Court, Fatou Bensouda, re-opens the preliminary examination of the situation in Iraq' available at <<https://www.icc-cpi.int/Pages/item.aspx?name=otp-statement-iraq-13-05-2014>> last accessed 25 October 2016.

Second, UK military personnel have benefited from the protection of the ECHR/HRA by ensuring accountability for the conduct of the Ministry of Defence.<sup>22</sup> In *Smith v Ministry of Defence* two sets of claims were brought against the Ministry of Defence: the ‘Challenger claims’ and the ‘Snatch Land Rover claims’. The ‘Challenger claims’ were negligence claims in respect of the death of one party and the injury of two others, which occurred during a friendly fire incident in a Challenger II tank taking part in the offensive on Basra in 2003. The ‘Snatch Land Rovers’ claims alleged that the Ministry of Defence was in breach of the obligation to safeguard life protected by ECHR art.2 due to failing to take reasonable measures in light of the real and immediate risk of soldiers with patrolling obligations. In both instances, the government was found to have failed to provide adequate equipment for the protection of soldiers’ lives. In particular, Snatch Land Rovers had no protection against improvised explosive devices, and although withdrawn from the battlefield as the result of the death of soldiers seven months previous to the incident in question, were re-introduced without further enquiry. Furthermore, the ECHR enabled military personnel who were dismissed from the armed forces on the grounds of their sexuality to sue the government under art.8 in the case of *Smith and Grady v UK*.<sup>23</sup>

Third, investigations of suspected breaches of law are in the interests of the military itself. As Noam Lubell and Daragh Murray note, ‘[b]y ensuring accountability where necessary, by disproving baseless allegations, and by demonstrating a commitment to the rule of law, the armed forces publicly demonstrate their integrity and professionalism – and ensure the public’s trust’.<sup>24</sup>

## **Can Derogations be made extraterritorially?**

Under art.15, a state can derogate from the ECHR if there is a ‘public emergency threatening the life of the nation’ and the measures taken to address that emergency must be ‘strictly required by the exigencies of the situation’. The state is afforded a wide margin of

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<sup>22</sup> *Smith v The Ministry of Defence* (n 5).

<sup>23</sup> *Smith and Grady* (n 5).

<sup>24</sup> Noam Lubell and Daragh Murray, ‘Why human rights law is not a threat to the British armed forces’ (The Conversation, 4<sup>th</sup> October 2016) available at

<<https://theconversation.com/why-human-rights-law-is-not-a-threat-to-the-british-armed-forces-66504>> last accessed 25<sup>th</sup> October 2016.

appreciation or degree of discretion for determining whether an emergency exists.<sup>25</sup> However, 'life of the nation' is given a much more limited interpretation and it is doubted that this expands extraterritorially. Sometimes it is confined to a smaller geographical area within the state, but its definition has not exceeded the territorial boundaries of a state.<sup>26</sup>

Commentators have mixed opinions. Marko Milanovic argues that the 'life of the nation' refers to the extraterritorial territory over which the Member State has control rather than an emergency taking place on UK territory.<sup>27</sup> Campbell McLachlan argues it is politically unjustified for occupying powers to issue a derogation. Given that a derogation arises only in 'an exceptional situation of crisis or emergency',<sup>28</sup> a derogation should not apply if the state has 'elected' to take part in military operations abroad and effectively made the foreign nation state, beyond its own internal control, a state of emergency.<sup>29</sup>

The Court signalled in *Banković v Belgium* that an extraterritorial derogation may be possible if states act in the belief that it is possible to derogate abroad, but that no such indication has been given so far.<sup>30</sup> This was corroborated by the Court in *Hassan* wherein it relied upon art.31(b) of the Vienna Convention on the Law of Treaties 1969 to establish whether 'subsequent practice' of states had indicated that a derogation was required in order for art.5 to be interpreted as including internment in armed conflict as an exception to the right to liberty and security.<sup>31</sup> It would therefore appear that an extraterritorial derogation under the ECHR is not impossible as its existence appears to rely on the behaviour and belief of states, as well as what they deem to be a state of emergency, regardless of where that is situated.

## **The scrutiny and effect of an extraterritorial derogation.**

While a wide margin of appreciation is accorded to states in determining whether there is a state of emergency justifying a derogation, greater scrutiny is given as to whether the

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<sup>25</sup> See eg *A v UK* (2009) 49 E.H.R.R. 29

<sup>26</sup> *Sakik v Turkey* (1998) 26 E.H.R.R. 662.

<sup>27</sup> Marko Milanovic, 'Extraterritorial Derogations from Human Rights Treaties in Armed Conflict' in Nehal Bhuta (ed), *The Frontiers of Human Rights: Extraterritoriality and its Challenges* (OUP 2016) 68-73.

<sup>28</sup> *Lawless v Ireland* (no 3) (1979-80) 1 E.H.R.R. 15 para 28.

<sup>29</sup> Campbell McLachlan, *Foreign Relations Law* (CUP 2014) 334.

<sup>30</sup> *Banković v Belgium* (2007) 44 E.H.R.R. SE5 para 62.

<sup>31</sup> *Hassan* (n 4) para 101.



measures are strictly required by the exigencies of the situation.<sup>32</sup> A test of proportionality is adopted for determining whether the measures which interfere with human rights protection effectively address the national security issue at hand, and interferes with rights no more than is necessary.<sup>33</sup> The Court's approach to applying the ECHR in armed conflict looks to the Geneva Conventions to determine what measures are necessary and not necessary in armed conflict, to strike the balance between military necessity and protection of civilians and combatants. Under a derogation, the Court will continue to look to other international legal standards pertaining to the situation to inform their understanding of what is necessary in the context. Oren Gross and Fionnuala Ni Aolain argue that greater judicial scrutiny should apply in states of emergencies as compared with times of peace, especially in extended periods of derogations from the ECHR.<sup>34</sup> The 2003-2008 occupation of Iraq and the UK presence in Afghanistan from 2001-2014 would surely attract great judicial scrutiny if a derogation had been issued in respect of either military interventions. Therefore, the intention of the government to decrease judicial scrutiny would not be achieved through lodging a derogation.

## **Political Ramifications**

An extraterritorial derogation under the ECHR may be possible, as it appears to rely primarily on state practice and belief, and a wide margin of appreciation is accorded to states in determining when there is a state of emergency. In saying that, a derogation from the ECHR may be merely of 'symbolic' significance if it, in fact, does not change the way in which the Court adjudicates upon extraterritorial armed conflict and it continues to take into account other international and domestic legal obligations relevant to the situation, and possibly enhances judicial scrutiny of those cases.

However, the symbolism of the derogation should be scrutinised both in terms of its domestic and international ramifications. Domestically, the statements made by the Defence Minister may have a chilling effect on those engaging in human rights litigation relating to extraterritorial armed conflict. Indeed, the Law Society President warned that '[l]awyers must not be hindered or intimidated in carrying out their professional duties and acting in the best

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<sup>32</sup> *A v UK* (n 25).

<sup>33</sup> Paul Craig, *Administrative Law* (4th ed Sweet and Maxwell, 1999) 590-91.

<sup>34</sup> Oren Gross and Fionnuala Ni Aolain, 'From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 ECHR' (2001) 23(3) *Human Rights Quarterly* 635.

interests of their clients within the law'.<sup>35</sup> Lieutenant Colonel Nicholas Mercer, the former chief legal adviser for the Army in Iraq said it was wrong 'simply to polarise it as money-grabbing lawyers' noting that the government had paid out £20 million for 326 cases that were proven to be legitimate cases concerning human rights abuses by UK armed forces.<sup>36</sup> Undermining or condemning the efforts of those who help hold the UK accountable in legitimate cases for rights violations committed abroad undermines freedom of expression, democratic accountability, and securing the UK's international status as a rights-abiding state. Fortunately, a derogation means that the government implicitly accepts the extraterritorial application of the ECHR, thus contributing to the de-territorialisation of accountability, and ensuring that double standards do not persist in relation to what states do on their territory and do outside of their territory. However, extraterritorial derogations create a new symbolic double standard, a hardening of territory once again, whereby the state is held to account for one set of obligations on its own territory and a different set abroad. This undermines a commitment to ensuring that UK actors are not perceived as 'gentlemen at home, hoodlums elsewhere'.<sup>37</sup> As Kanstantsin Dzehtsiarou points out, Russian media very quickly observed that the UK had decided to exempt troops from the ECHR to stop 'annoying' claims.<sup>38</sup> The UK's ability to derogate from international commitments abroad may mean that accusations against Russia for ECHR violations may no longer have the same political purchase as before.<sup>39</sup>

The proposal for a derogation sends a signal to those within the UK that human rights have only served to undermine national security and hamper the effectiveness of military interventions abroad. This feeds into a broader narrative of anti-human rights rhetoric which

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<sup>35</sup> [<https://www.lawsociety.org.uk/news/press-releases/law-society-comment-on-legal-cases-against-uk-troops-in-iraq/>]

<sup>36</sup> 'UK troops to be protected from "spurious legal claims"' (n 6).

<sup>37</sup> *Al Skeini v United Kingdom* (2011) 53 E.H.R.R. 18 Concurring Opinion Judge Bonello.

<sup>38</sup> 'Human rights no more? UK to exempt troops from European Convention to stop 'annoying' claims' (Russia Today 4 October 2016) available at <<https://www.rt.com/uk/361516-human-rights-convention-troops/>> last accessed 25<sup>th</sup> October 2016.

<sup>39</sup> Alexandra Sims, 'Vladimir Putin signs law allowing Russia to ignore international human rights rulings' (The Independent, 15 December 2015) available at <<http://www.independent.co.uk/news/world/europe/vladimir-putin-signs-law-allowing-russian-court-to-overthrow-international-human-rights-rulings-a6773581.html>> last accessed 25<sup>th</sup> October 2016.

does not celebrate the ability of judicial enforcement of human rights to empower individuals to hold the state accountable for its actions within the domestic territory and abroad. It instead turns people against human rights as it is conveyed as an instrument for facilitating the enemy and the other. Therefore, it is imperative that resistance is shown towards a derogation because the impact of its symbolism should not be underestimated. There needs to be a fair portrayal of ECHR adjudication on the armed forces in the absence of a derogation, and continual reminder that human rights serve to buttress UK democracy and the rule of law.